Bellajade Sdn Bhd v CME Group Bhd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NOS 08(RS)-10–10 OF 2018 (W) AND 08(RS)-11–10 OF 2018
DAVID WONG CJ (SABAH AND SARAWAK), ROHANA YUSUF, ZAWAWI SALLEH, TENGKU MAIMUN AND NALLINI PATHMANATHAN FCJJ
15 JULY 2019

Civil Procedure — Judgment — Federal Court — One member of five judge coram that heard appeal resigned before delivery of reserved judgment — Whether remaining judges in coram could deliver majority verdict by concurring with and adopting judgment written by resigning judge before he resigned — Whether resigning judge ceased to be member of coram and his judgment of no legal effect on the date judgment pronounced — Whether s 78(2) of the Courts of Judicature Act 1964 ('the CJA') mandated that opinion of majority of remaining judges in coram shall determine the appeal — Whether act of remaining judges in merely concurring with and adopting judgment written by resigning judge was not only futile and invalid exercise but created doubt whether judgment delivered in fact reflected their opinion or that of the resigning judge — Whether s 78 of the CJA was not restricted in its application to only sitting judges who were absent from the proceeding due to illness or bodily infirmity — Whether phrase 'any other cause' in s 78(1) of the CJA was wide enough to include a judge who had retired, died or been dismissed

On 12 March 2018, the Federal Court reserved judgment after hearing arguments in respect of an appeal by the respondents herein against a decision of the Court of Appeal ('COA') allowing the applicant's appeal against a High Court decision favouring the respondents. The coram of five judges who heard the Federal Court appeal included the then President of the COA, Tan Sri Zulkefli bin Ahmad Makinudin ('Tan Sri Zulkefli'). Tan Sri Zulkefli resigned as a judge on 11 July 2018. When the judgment in respect of the appeal was delivered about two months later, on 25 September 2018, by the remaining four judges in the original coram, three of them purportedly delivered a majority verdict, allowing the appeal, by issuing a certificate dated by them stating that they concurred with and adopted a judgment that was prepared by Tan Sri Zulkefli 'prior to his retirement'. Attached to the certificate was an undated and unsigned copy of the judgment with Tan Sri Zulkefli's name listed at the top of the stated coram of judges. The fourth judge in the coram dissented and dismissed the appeal. The two instant applications, under r 137 of the Rules of the Federal Court 1995, requested the court to review and set aside both the majority and minority judgments on the ground that the entire decision of the Federal Court was invalidated by Tan Sri Zulkefli's resignation.

The applicant contended that the judges who purportedly delivered the majority verdict could not concur with and adopt the judgment of another judge who had been on the same panel but who had ceased to be a judge before the judgment was delivered and pronounced. Section 78(1) and (2) of the Courts of Judicature Act 1964 ('the CJA') provided, inter alia, that if at any time before delivery of a reserved judgment, a judge who had heard the proceeding could not attend the proceeding or exercise his functions as a judge due to illness or any other cause, the reserved judgment shall be delivered by the remaining judges of the court, not being less than two; and in such an event, the opinion of the majority of the remaining judges of the court shall determine the proceeding, and, if there was no majority, the proceeding shall be re-heard. The Malaysian Bar Council, which was allowed to intervene in the instant proceedings, took the view that s 78 of the CJA only applied if the judge who was absent from the proceeding was a sitting judge and not one who had retired, resigned or had been dismissed.

Held:

(1) The majority judgment was illegal for breaching s 78 of the CJA. Although the three majority judges attempted to say that the judgment of Tan Sri Zulkefli was really their judgment, it was a non-existing judgment which could not play any part or be relied upon in their deliberation in coming to a decision (see paras 54–55).

(2) Judgments were only effective on the date of their pronouncement as judges were entitled to change their minds and make amendments to the judgments prior to pronouncement of the same. As Tan Sri Zulkefli at the date of pronouncement of the judgment on 25 September 2018 did not hold any judicial post, his judgment could not be featured in any way at all as by doing so it could be said that he had continued to be a member of the coram on that day. It was not legally competent for the remaining judges to deliver and pronounce his judgment. The views of the three remaining judges had to be theirs. Relying on the impugned judgment by concurring with and adopting it gave rise to the inference that the 'mind of the court' was that of a judge who had lost his jurisdiction due to his resignation (see paras 27 & 43).

(3) In law, the judgment of Tan Sri Zulkefli did not and could not exist as there was no such judge in the coram, so to speak. Any attempt to 'concur and adopt' by the three majority judges was an exercise in futility as there was no such judgment in existence. The three majority judges could not resuscitate something which no longer existed at the point of pronouncement of judgment on 25 September 2018 (see paras 28–29).

(4) Section 78(2) of the CJA mandated that the judgment was to be determined in accordance with the opinion of the majority of the remaining judges. The majority view of the three judges had to be formed

through their own views as they were the only ones who had the jurisdiction to decide. In the instant case, the opinions of the three majority judges were determined predominantly by the opinion of Tan Sri Zulkefli with whom the majority judges merely concurred. There was doubt whether the judgment delivered was in fact the opinion of the three majority judges or that of Tan Sri Zulkefli. What was fatal was that the three majority judges relied on the opinion of a judge who held no judicial position at the time of delivery of the judgment. Section 78 of the CJA prohibited any judge who had retired or resigned or was unable 'for any other reason' from participating in the proceeding of the court (see paras 26, 28, 37, 41 & 43).

(5) The contentions of the Bar Council had to be rejected. The court would have agreed with the Bar Council's position if the phrase 'any other cause' was absent in s 78 of the CJA. The Legislature did not legislate in vain. The courts had to give to legislation a meaning that was reasonable and purposive as any other interpretation would be contrary to the intention of Parliament (see paras 46 & 52).

[Bahasa Malaysia summary

Pada 12 Mac 2018, Mahkamah Persekutuan mengakas penghakiman selepas mendengar hujah berkaitan rayuan oleh responden-responden terhadap keputusan Mahkamah Rayuan ('MR') yang membenarkan rayuan perayu terhadap keputusan Mahkamah Tinggi yang berpihak kepada responden-responden. Korum lima hakim yang mendengar rayuan Mahkamah Persekutuan termasuk mantan Presiden MR, Tan Sri Zulkefli bin Ahmad Makinudin ('Tan Sri Zulkefli'), Tan Sri Zulkefli telah meletak jawatan sebagai hakim pada 11 Julai 2018. Apabila penghakiman berkaitan rayuan itu disampaikan lebih kurang dua bulan kemudian, pada 25 September 2018, oleh empat hakim yang bersidang dalam korum asal, tiga daripada mereka bagi maksud menyampaikan keputusan majoriti, telah membenarkan rayuan itu, dengan mengeluarkan perakuan yang diberi tarikh oleh mereka yang menyatakan bahawa mereka bersetuju dengan dan mengguna pakai penghakiman yang telah disediakan oleh Tan Sri Zulkefli 'prior to his retirement'. Bersama perakuan itu dilampirkan bersama salinan penghakiman yang tidak bertarikh dan tidak ditandatangani dengan nama Tan Sri Zulkefli disenaraikan di bahagian atas untuk korum hakim yang dinyatakan. Hakim keempat dalam korum itu menentang dan menolak rayuan itu. Dua permohonan ini, di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995, meminta mahkamah menyemak semula dan mengetepikan kedua-dua penghakiman majoriti dan minoriti itu atas alasan bahawa keseluruhan keputusan Mahkamah Persekutuan telah menjadi tidak sah dengan peletakan jawatan Tan Sri Zulkefli. Pemohon menegaskan bahawa hakim-hakim tersebut yang mana bagi maksud menyampaikan keputusan majoriti itu tidak boleh bersetuju dengan dan mengguna pakai penghakiman hakim yang lain yang

merupakan panel sama tetapi telah berhenti menjadi hakim sebelum penghakiman tersebut disampaikan dan diisytiharkan. Seksyen 78(1) dan (2) Akta Mahkamah Kehakiman 1964 ('AMK') memperuntukkan, antara lain, bahawa jika pada bila-bila masa sebekum penyampaian penghakiman yang disediakan, seorang hakim yang telah mendengar prosiding tidak boleh menghadiri prosiding atau melaksanakan fungsinya sebagai hakim akibat kesihatan atau sebab lain, penghakiman yang disediakan itu hendaklah disampaikan oleh hakim mahkamah yang masih ada, yang tidak kurang daripada dua; dan dalam keadaan sedemikian, pendapat majoriti hakim mahkamah yang masih ada hendaklah menentukan prosiding, dan, jika tiada majoriti, prosiding hendaklah didengar semula. Majlis Peguam Malaysia, yang dibenarkan untuk campur tangan dalam prosiding ini, berpendapat bahawa s 78 AMK hanya terpakai jika hakim yang tidak hadir dalam prosiding adalah hakim yang bersidang dan bukan yang telah bersara, meletak jawatan atau telah disingkirkan.

Diputuskan:

(1) Penghakiman majoriti adalah tidak sah keran melanggar s 78 AMK. Walaupun ketiga-tiga hakim majoriti telah mencuba untuk menyatakan bahawa penghakiman Tan Sri Zulkefli sebenarnya adalah penghakiman mereka, ia bukan suatu penghakiman yang wujud yang boleh memainkan peranan dalam mana-mana bahagian atau boleh digunakan dalam pertimbangan mereka untuk membuat keputusan (lihat perenggan 54–55).

(2) Penghakiman-penghakiman hanya berkesan pada tarikh pengisytiharan mereka kerana hakim-hakim berhak mengubah fikiran mereka dan membaut pindaan kepada penghakiman sebeklum pengisytiharan yang sama. Oleh kerana Tan Sri Zulkefli pada tarikh pengisytiharan penghakman pada 25 September 2018 tidak memegang apa-apa jawatan kehakiman, penghakimannya tidak boleh dinyatakan dalam apa cara pun sebagai berbuat sedemikian agar ia boleh dikatakan bahawa beliau telah meneruskan sebagai ahli korum pada hari tersebut. Ia tidak kompeten secara tidak sah untuk hakim-hakim yang masih ada menyampaikan dan mengisytiharkan penghakimannya. Pendapat ketiga-tiga hakim yang masih ada itu adalah pendapat mereka. Bergantung kepada penghakiman yang dipersoalkan dengan bersetuju dengan dan menggunapakainya menimbulkan inferens bahawa 'mind of the court' adalah oleh seorang hakim yang telah hilang bidang kuasannya akibat peletakan jawatannya (lihat perenggan 27 & 43).

(3) Dari segi undang-undang, penghakiman Tan Sri Zulkefli tidak dan tidak boleh wujud kerana tiada hakim sedemikian dalam korum tersebut, kerana tiada penghakiman sedemikian yang wujud. Ketiga-tiga hakim majoriti itu tidak boleh mengembalikan sesuatu yang tiada lagi wujud

pada masa pengisytiharan penghakiman pada 25 September 2018 (lihat perenggan 28–29).

(4) Seksyen 78(2) AMK memandatkan bahawa penghakiman itu hendaklah ditentukan menurut pendapat majoriti hakim-hakim yang masih kekal. Pendapat majoriti tiga hakim tersebut hendaklah dibentuk melalui pendapat mereka sahaja kerana hanya merekalah yang mempunyai bidang kuasa untuk membuat keputusan. Dalam kes ini, pendapat tiga hakim majoriti tersebut telah ditentukan secara dominan oleh pendapat Tan Sri Zulkefli yang mana hakim-hakim majoriti tersebut hanya bersetuju. Terdapat keraguan sama ada penghakiman yang disampaikan adalah sebenarnya pendapat tiga hakim majoriti atau pendapat Tan Sri Zulkefli. Apa yang memudaratkan adalah bahawa tiga hakim majoriti tersebut bergantung kepada pendapat hakim yang tidak memegang jawatan kehakiman pada masa menyampaikan penghakiman tersebut. Seksyen 78 AMK melarang mana-mana hakim yang telah bersara atau meletak jawatan atau tidak berupaya 'for any other reason' daripada terlibat dalam prosiding mahkamah (lihat perenggan 26, 28, 37, 41 & 43).

(5) Hujah Majlis Peguam hendaklah ditolak. Mahkamah mungkin bersetuju dengan kedudukan Majlis Peguam jika ungkapan 'any other cause' tiada dalam s 78 AMK. Badan perundangan tidak membuat perundangan yang sia-sia. Mahkamah patut memberikan perundangan suatu maksud yang munasabah dan mempunyai tujuan kerana apa-apa tafsiran lain adalah bertentangan dengan niat Parlimen (lihat perenggan 46 & 52).]

Notes

For cases on Federal Court, see 2(3) Mallal's Digest (5th Ed, 2017 Reissue) paras 5307–5308.

Cases referred to

Adorna Properties Sdn Bhd v Kobchai Sosothikul [2006] 1 MLJ 417; [2005] 1 CLJ 565, FC (refd)

Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application [2005] 3 MLJ 1; [2004] 4 CLJ 350, FC (refd)

CME Group Bhd v Bellajade Sdn Bhd and another appeal [2019] 1 MLJ 141; [2018] 10 CLJ 147, FC (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (distd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2007] 6 MLJ 485, FC (refd)

MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2002] 2 MLJ 673; [2002] 3 CLJ 577, FC (refd)

Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd [2011] 1 SLR 998; [2010] SGCA 39, CA (refd)

Paul Chen-Young & Ors v Eagle Merchant Bank Jamaica Ltd & Anor [2018] JMCA App 7, CA (distd)
Raja Prithwi Chand Lall Choudhary v Sukrai AIR 1941 FC 1 (refd)
Ramachandran a/l Suppiah v Public Prosecutor and another motion [1992] 2 SLR 707, CA (distd)
Surendra Singh and Others v The State of Uttar Pradesh 1954 AIR 194, SC (distd)
Taylor and another v Lawrence and another [2002] 2 All ER 353, CA (refd)
Uddin (a child) (serious injury: standard of proof), Re [2005] 3 All ER 550, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 74, 78, 78(1), (2)
Judicature (Supreme Court) Act [JM] s 7(3)
Rules of the Federal Court 1995 rr 63, 137

M Pathmanathan (Ambiga Sreenevasan, Michele Kaur, Shireen Selvaratnam, Shanti Pathmanathan, Shirin Pathmanathan and Ng Carmen with him) (Sun & Michele) in Civil Application Nos 08(RS)-10–10 of 2018 (W) and 08(RS)-11–10 of 2018 (W) for the applicant.
Gopal Sri Ram (Wong Rhen Yen, Sim Kok Yew, Emily Wong, Mohd Khairi Ahmad Tarmizi, Yasmeen So and How Li Nee with him (KY Sim & Co) in Civil Application No 08(RS)-10–10 of 2018 (W) for the respondent.
K Kirubakaran (Cheyenne Chan with him) (Shui Tai) in Civil Application No 08(RS)-11–10 of 2018 (W) for the respondent.

David Wong CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] The applicant made two applications under r 137 of the Rules of the Federal Court 1995 ('r 137') to review and set aside the entire judgment of the Federal Court (both the majority and the minority) delivered on 25 September 2018 (including the Federal Court order dated 13 November 2017 granting the respondent leave to appeal).

[2] The grounds upon which the applications were premised were as follows:

(a) coram failure as the three of four remaining judges of the original coram purported to 'concur and adopt the judgment' of Tan Sri Dato Seri Zulkefli bin Ahmad Makinudin ('Tan Sri Zulkefli'), who had resigned as a judge on 11 July 2018, prior to the delivery and pronouncement of the judgment which renders the judgment invalid, contrary to law, void and of no effect; and

(b) unconstitutionality of the appointment of Tan Sri Zulkefli as an additional judge and as President of the Court of Appeal as he had reached the constitutional mandatory retirement age of 66 years and six months hence the coram who heard the appeals was not duly constituted.

[3] We heard the applications and after careful consideration of the submissions of respective counsel, we unanimously allowed the applications of the applicant in that we set aside the entire judgment of the Federal Court (both the majority and the minority) delivered on 25 September 2018 and ordered this appeal be heard by another panel. We now give our reasons for our decision.

THE BACKGROUND FACTS

[4] In gist, the parties in this case are Bellajade Sdn Bhd ('the applicant'), CME Group Bhd ('the first respondent') and Tan Sri Dato' Sri Lim Cheng Pow ('the second respondent') who entered into a tenancy agreement dated 21 February 2013 for a period of three years in respect of a 23 storey office building, known as Plaza Palas located at Jalan Tun Razak, Kuala Lumpur owned by the applicant. The tenant is the first respondent with the second respondent as the guarantor to the tenancy agreement.

[5] The applicant brought an action against the respondents at the Kuala Lumpur High Court alleging that first respondent had defaulted in the monthly rental payment and thus in breach of the tenancy agreement. In response, the first respondent filed a counterclaim for refund of rentals paid. The High Court on 20 May 2015 dismissed the applicant's claim against the respondents and allowed the first respondent's counterclaim. The applicant appealed to the Court of Appeal.

[6] The Court of Appeal on 24 August 2016 unanimously allowed the applicant's appeal and entered judgment against both respondents for the outstanding rents together with interest thereon. The respondents applied to the Federal Court for leave to appeal and on 13 November 2017, leave to appeal was granted.

[7] The appeal was then heard on 12 March 2018 by a coram of five judges constituting of Tan Sri Zulkefli, Tan Sri Datuk Zainun bt Ali, Tan Sri Azahar bin Mohamed, Tan Sri Zaharah bt Ibrahim and Dato' Balia Yusof bin Hj Wahi. Judgment was reserved and on 25 September 2018, parties were summoned to appear for delivery of the impugned judgment.

[8] The impugned judgment was delivered by the remaining four judges in the original panel as Tan Sri Zulkefli had resigned on 11 July 2018, some two

months prior to the delivery and pronouncement of the impugned judgement. A

[9] In delivering the impugned judgment, three judges (majority) purported to 'concur and adopt' the judgment of Tan Sri Zulkefli and one judge proceeded to read out parts of the impugned judgment, signed by Tan Sri Zulkefli, which allowed the respondents' appeal, reversed the Court of Appeal's judgment and reinstated the High Court's orders. B

[10] A covering certificate was then issued by the three majority judges stipulating that the impugned judgment was prepared by Tan Sri Zulkefli and further stating that they 'concur with and adopt the judgment'. This certificate was dated by them. An undated and unsigned copy of the impugned judgment was also attached with Tan Sri Zulkefli's name at the top of the coram. C

[11] Tan Sri Zainun Ali bt Ali FCJ, on the other hand, dissented and dismissed the appeal. D

OUR DECISION

The law on review E

[12] The circumstances in which this court exercises its power to review earlier decisions are succinctly set out by the learned author Tan Kee Heng, in *Civil and Criminal Appeal in Malaysia* (3rd Ed) at pp 239–240 and they are these: F

(a) that there was a lack of quorum or quorum failure, for example the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61);

(b) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577); G

(c) where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application* [2005] 3 MLJ 1; [2004] 4 CLJ 350); H

(d) clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 CLJ 565); I

(e) where an applicant under r 137 of the RFC 1995 had not been heard by Federal Court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand Lall Choudhary v*

Sukrai AIR 1941 FC 1);

(f) where bias had been established (*Taylor and another v Lawrence and another* [2002] 2 All ER 353);

(g) where it is demonstrated that the integrity of its earlier decision had been critically undermined, for example where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin (a child) (serious injury: standard of proof)* [2005] 3 All ER 550);

(h) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and the Court of Appeal (*Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485); and

(i) where the manner in which the apex court arrived at that previous decision constituted a breach of natural justice (*Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998 at para 55; [2010] SGCA 39, Singapore Court of Appeal).

[13] The above circumstances are of course not exhaustive and this court in an appropriate circumstance and opportune time may invoke its power to review.

The coram failure issue

The applicant's position

[14] The premise upon which the applicant relied on in its application was s 78(1) of the Courts of Judicature Act 1964 ('the CJA') which reads as follows:

78 Continuation of proceedings notwithstanding absence of Judge.

(1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall continue before, and Judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

[15] It was the contention of the applicant that the three majority judges in relying on s 78(1) of the CJA to deliver their grounds had in fact fallen foul of the same and the reasons for such contention were these.

[16] Section 78 of the CJA provides that for the purpose of delivering a reserved judgment only the remaining judges of the court shall have the power to deliver the same provided that there is a majority opinion of the remaining judges.

[17] The remaining judges as provided in s 78 of the CJA, it was submitted, do not include judges who had retired or resigned and hence they are prohibited to take part in the determination of a reserved judgment. Only the remaining judges have the jurisdiction to determine the case.

[18] As it was not disputed that Tan Sri Zulkefli had ceased to be a judge of the Federal Court at the time of the delivery of the judgment, it was submitted by the applicant that any reliance or referral to the judgment prepared by him before his resignation was improper and would render the majority judgment invalid, null and void.

[19] Learned counsel for the applicant had also referred us to the last paragraph of the judgment (para 34) which reads:

> For the reasons above stated I allow the appeals by both the first and second defendants with costs.

This last paragraph, as submitted, gave the impression that Tan Sri Zulkefli had remained part of the coram of the court which was wrong in law. Hence, despite the use of the phrase 'concur and adopt' to the impugned judgment of Tan Sri Zulkefli by the three remaining judges, it could not have saved the invalidity of the majority judgment.

[20] It was further submitted that the impugned judgment was further flawed and contrary to law because the names of all the five judges of the original coram, including Tan Sri Zulkefli, appeared on the face of the judgment as constituting the coram which pronounced the judgment on 25 September 2018. This according to learned counsel had given a reasonable conclusion that the decision was by a majority of four and not three and that Tan Sri Zulkefli was the President of the Court of Appeal on that day sitting as the presiding Judge as can be seen the manner it was reported in *CME Group Bhd v Bellajade Sdn Bhd and another appeal* [2019] 1 MLJ 141; [2018] 10 CLJ 147 which shows that there was a majority judgment of four with a dissenting judgment of Justice Zainun bt Ali.

The Malaysian Bar's position

[21] Leave was granted to the Bar Council on the day of hearing to intervene in this application in view of the public interest nature in the same. Their stand was slightly different to the applicant and it was this. Section 78 of the CJA is only applicable to absent judges who are still sitting judges and do not apply to judges who had retired, resigned or dismissed. And since Tan Sri Zulkefli had resigned, s 78 of the CJA did not and could not save the impugned judgment and the appeal ought to be reheard again.

The respondent's position

[22] The contention of learned counsel for the respondent was quite straightforward in that it had relied on the pronouncement by the three majority judges on 25 September 2018 which reads as follows:

> This judgement is the judgement of the majority and is delivered pursuant to sub-s 78(1) of the Courts of Judicature Act 1964.
>
> The judgement as set out below was prepared by Tan Sri Zulkefli bin Ahmad Makinudin, the then President of the Court of Appeal, prior to his retirement. We concur with and adopt the judgment.

[23] It was then submitted that despite the presence of the grounds prepared by Tan Sri Zulkefli, the three majority judges had made it quite clear that their decision was theirs and not that of Tan Sri Zulkefli. This can be inferred when they said they 'concur with and adopt' the judgment of Tan Sri Zulkefli. Thus, the pronouncement made by the three majority judges on 25 September 2018 was in accordance with s 78 of the CJA.

Our opinion

[24] In our deliberation, the starting point was naturally s 78(1) of the CJA which had been produced earlier. The salient points are these. If a judge is unable to attend proceeding due to illness or any other cause, the remaining judges can continue the proceeding if the number is not less than two. Further, any judgment to be delivered must be a majority judgment of the remaining judges. Hence, it can be said that s 78 of the CJA is effectively a saving provision as it deems the court to be properly constituted notwithstanding the general requirements of s 74 of the CJA.

[25] What concerned us was whether the impugned judgment of the three majority judges in law was in fact their judgment and not that of the non-sitting judge (Tan Sri Zulkefli). The wording of s 78(1) of the CJA is clear in that it provides, '... Judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court ...'. Section 78(2) further states

'proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard'.

[26] In short, the majority view of the three judges must be formed through their own views as they are the only ones who had the jurisdiction to decide. Therefore, it was our view that s 78 of the CJA prohibits any judge who had retired or resigned or was unable 'for any other cause' from participating in the proceeding of the court.

[27] Reverting to the case at hand, we found merit in the argument of learned counsel for the applicant. As Tan Sri Zulkefli at the date of pronouncement of the judgment on 25 September 2018 did not hold any judicial post, his judgment cannot be featured in any way at all as by doing so it can be said that he continued to be a member of the coram on that day hence it was not legally competent for the remaining Judges to deliver and pronounce his judgment. As stated earlier, the views of the three remaining judges must be theirs. Relying on the impugned judgment by concurring with and adopting it gave rise to the inference that the 'mind of the court' was that of a judge who had lost his jurisdiction due to his resignation. This was reflected in the concluding paragraph of his judgment which reads as follows:

> CONCLUSION
>
> [34] For the reasons above stated I allow the appeals by both the first and second defendants with costs. The orders of the Court of Appeal are hereby set aside and the orders of the High Court are reinstated. The deposit is to be refunded to the defendants.
>
> (ZULKEFLI BIN AHMAD MAKINUDIN)
>
> President
>
> Court of Appeal of Malaysia
>
> Dated:

[28] The judgment of Tan Sri Zulkefli in our view in law did not exist and cannot exist as there was no such Judge in the coram so to speak. Hence, any attempt to 'concur and adopt' by the three majority judges was an exercise in futility as there was no such judgment in existence. With respect, this was in contravention of s 78(2) of the CJA, which requires judgment to be determined in accordance with the opinion of only the majority of the remaining judges.

[29] The three majority judges cannot resuscitate something which no longer existed at the point of pronouncement of judgment on 25 September 2018.

[30] We found similar sentiments expressed in case law. One such case is the judgment of this court in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 ('Chia Yan Tek') where this court allowed a review application made pursuant to r 137 and set aside a judgment given in contravention of s 78 of the CJA and r 63 of the Rules of the Federal Court.

[31] In *Chia Yan Tek*, an appeal was heard by three judges. The first judge and the second judge signed the court's judgment on 19 December 2000. By the time the judgment was pronounced on 22 December 2000, the first and the third judge had already retired. Only the second judge remained on the date the judgment was delivered in the open court on 22 December 2000. This court heard and sustained the application under r 137 and set aside the aforesaid judgment, premised on the ground that the material date is the date of pronouncement of the judgment. However on that date, there was no properly constituted panel of the court as there was only one remaining judge.

[32] This court in *Chia Yan Tek* had examined the reasoning and rationales in the cases of *Surendra Singh and Others v The State of Uttar Pradesh* 1954 AIR 194 Supreme Court ('Surendra Singh') and *Ramachandran a/l Suppiah v Public Prosecutor and another motion* [1992] 2 SLR 707 ('Ramachandran') and had adopted and concurred to the views expressed there.

[33] In *Ramachandran*, a case across the causeway, the factual matrix was quite similar to our present appeal. There, one of the three appeal judges retired on 30 September 1989 and had signed the judgment. The remaining two judges however dated and delivered the aforesaid judgment on 10 January 1991. That judgment was found to be invalid as at the date of delivery, the retired judge held no judicial power. By using his judgment, the remaining judges had exceeded their jurisdiction hence affecting the validity of the judgment. The rationale of the Supreme Court was expressed in this manner:

> a Judgment of the court was the expression of the court's opinion at the time of delivery, Until the time of delivery, a Judge is entitled to change his mind as to what is to be delivered. Therefore, any Judge who delivers a Judgment or causes it to be delivered by a brother Judge must be in existence as a proper member of the court at the moment of delivery.ss

[34] The case of *Surendra Singh* was instructive to us. There in a High Court matter in India, there was a coram of two judges who heard the matter. Bhargava J and Kidwai J were the judges. Bhargava J wrote the judgment as a joint judgment of himself and Kidwai J, and signed every page of it and sent it to Kidwai J. After the death of Bhargava J on 24 December 1952, Kidwai J on 5 January 1953 purported to deliver the 'judgment' of the court, signed and dated it 5 January 1953. The court in setting aside the judgment held as follows:

> Bhargava J's signature was still there and anyone reading the judgment and not knowing the facts would conclude that Bhargava J was a party to the delivery on 05.01.1953 ... The question is whether this 'judgment' could be validly delivered after the death of one of the two Judges who heard the appeal.
>
> In our opinion, a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open Court.
>
> An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the Court as it is at the time of pronouncement.
>
> But however it is done it must be an expression of the mind of the Court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything else up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open Court with the intention of making it the operative decision of the Court. That is what constitutes the 'judgment'.
>
> Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of 'locus poaenitentiae' and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallise into a full-fledged judgment and become operative. It follows that the Judge who 'delivers' the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can if necessary, stop delivery and say that he has changed his mind.

[35] Tan Sri Zulkefli's status was in our view the same as Bhargava J in *Surendra Singh* in that both held no judicial position to exercise any judicial power on the date of delivery or pronouncement of the judgment. Therefore, any reliance on a judgment of a non-existent member of the coram deems improper.

[36] In the Jamaican Court of Appeal, we found another instructive and persuasive case in *Paul Chen-Young & Ors v Eagle Merchant Bank Jamaica Ltd & Anor* [2018] JMCA App 7 ('Paul Chen-Young'). The facts were these. There, an appeal was heard by a panel of three judges over 18 days and on 6 November 2013 had reserved judgment. All the three judges had retired by July 2016 upon reaching their respective retirement ages. However, a new panel of three judges on 1 December 2017 delivered the judgment of the retired three judges which led to a challenge as to the validity of the judgment. The Court of Appeal unanimously held that the impugned judgment was 'null

and void and of no legal effect' as the judges, due to their retirements, were without authority to render a judgment when it was purportedly handed down for them by the new panel.

[37] Applying the rationales of the aforesaid cases, we had no difficulty to sustain the contention of the applicant in that the opinions of the three majority judges were determined predominantly by the opinion of Tan Sri Zulkefli with whom the majority judges merely concurred. We found corroboration and merit in the submission of learned counsel where the ultimate paragraph of Tan Sri Zulkifli (produced earlier at para 27) was produced by the three majority judges.

Bar Council's stand

[38] We then considered the position of the Bar Council. To recapitulate, it was submitted that s 78 of the CJA only applies to judges who are still members of the bench premised on the definition of what a 'judge' means in s 78 of the CJA. The word 'judge' is defined in s 3 of the CJA as a judge of the Federal Court, of the Court of Appeal or the High Court, and includes the Chief Justice, the President and a Chief Judge. Therefore, it was submitted that s 78 of the CJA is restricted to judges who are absent while they are still sitting judges in the judiciary. The phrase 'any other cause' thus cannot cover judges who are no longer serving judges.

[39] In supporting the aforesaid contention, learned counsel for the Bar Council relied on cases discussed earlier, namely *Chia Yan Tek*, *Paul Chen-Young*, *Surendra Singh*, and *Ramachandran*.

[40] With respect, those cases can be distinguished from the present appeal. Though we had discussed the cases in some detail as to the reasons why they supported our conclusion on the coram issue raised by the applicant, we found it necessary to set out at the risk of repetition the reasons why reliance on those cases by learned counsel was misguided.

[41] In *Chan Yan Tek*, two out of three judges had retired prior to the pronouncement of the judgment leaving only one judge which would not have complied with the minimum of two remaining judges prescribed under s 78 of the CJA. There was a complete failure of coram of judges. In this case, there was no complete failure of coram in that we had four remaining judges. What was fatal here was simply that the three majority judges had relied on the opinion of a judge who held no judicial position at the time of delivery of judgment.

[42] In *Surendra Singh*, there was a coram of two judges in the High Court hearing an appeal and one out of the two judges had retired. Though there was

no s 78 of the CJA provision in India, one can conclude that there was also a complete failure of coram in terms of the aforesaid provision in the context of the Malaysian jurisdiction. As pointed out earlier, we have a saving provision in s 78 of the CJA which requires a minimum of two judges and in the present case, there were four remaining judges.

[43] Despite the above distinction, we found these principles expounded in *Surendra Singh* to be entirely correct. Judgments are only effective on the date of the pronouncement. Judges are entitled to change their minds and make amendments to the judgments prior to pronouncement of the same. And as a matter of public policy, there should not be any question of doubt or conjecture that the judgments delivered belonged entirely to the judges who delivered the same. In the present case, as pointed out by learned counsel for the applicant, the manner in which the judgment was delivered had given rise to doubt as to whether the judgment delivered was in fact the opinions of the three majority judges or that of Tan Sri Zulkefli. Section 78 of the CJA mandates that the judgment delivered must reflect the opinions of the remaining judges.

[44] Again, the factual matrix in *Paul Chen-Young* was diametrically different to our appeal. There, all the three appellate judges have retired by the time judgment was given and a different panel of three judges took over and delivered their judgment. This would have been a complete failure of coram in Malaysia. The Jamaican's s 7(3) of the Judicature (Supreme Court) Act allows the remaining judges to devolve on the matter. In that case however, no judge from the original remained as all three of them had retired before their judgment was delivered by a new panel.

[45] In *Ramachandran*, one of the three appeal judges had retired on 30 September 1989 and signed the judgment. That judgment was eventually delivered some one year later on 10 January 1991 by the two remaining judges who had also dated it 10 January 1991. Again, in setting that judgment aside, the Supreme Court held that the remaining judges had exceeded their jurisdiction when they relied on the judgment of the retired judge as they must form their own opinion as required of the three majority judges here. With that, we then moved on how s 78 of the CJA ought to be construed.

[46] With respect, we found no merit in the contention put forth by learned counsel. If the phrase 'any other cause' is absent in s 78 of the CJA, then we would have agreed with the position of the Bar Council. Legislature does not legislate in vain, so to speak. Hence courts must give it a meaning consistent to notions of reasonableness and purposiveness.

[47] The Federal Court in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 had an opportunity to express opinions on s 78 of the

CJA. In that case, this court set aside a judgment delivered after a retirement of one of the judges on the ground that there was an absence of consent by respective parties as required under the pre-amended s 78 of the CJA. Consent was held to be a pre-requisite as that right was a substantive right of the parties. Hence this court had no option but to set aside the impugned judgment. Further it ought to be pointed out that there was no dispute that the remaining two judges constituted a proper coram as only the then Chief Judge of Sabah and Sarawak had retired by then. But the law as it stood then, despite a properly constituted coram of judges, consent by the parties was required in law and there was none.

[48] On the applicability s 78 of the Courts Of Judicature Act 1964, learned counsel in that case had argued that it did not apply as it does not envisage a situation where a judge hearing the appeal is no longer a judge by reason of retirement or death or dismissal at the time when the decision is delivered or pronounced. It was submitted there that the phrase 'any other cause' referred primarily to causes such as bodily infirmity and other physical causes. That submission was rejected by the three judges.

[49] Siti Norma Yaakob FCJ had this to say at p 697 on what 'any other cause' means:

> The relevant provision of s 78 both in its original and amended forms, specifying the reasons for the absence of a judge are wide enough to include a judge who has retired, died or dismissed. This was clear from the words 'any other cause' appearing in the phrase 'unable through illness or any other cause to attend the hearing or otherwise exercise his function of a Judge of the court'. Those words admit to the interpretation that the other reasons why the absent judge could not function as one may well be due to his retirement, death or dismissal.

[50] The then Chief Justice of Sabah and Sarawak Steve Shim expressed similar view at p 687:

> With respect, I do not see the rationality of this proposition. In any event, it does not help the applicant's case because counsel's use of the word 'primarily' would seem to suggest that the ailments referred were not restricted entirely to bodily infirmity and other physical causes. In my view, the words in s 78 are clear enough. The term 'any other cause' must necessarily cover a situation where a judge has retired. To construe otherwise would create an absurdity. That could not have been the intention of Parliament. The first approach taken by the applicant holds no water.

[51] Similar sentiment was expressed by Haidar FCJ at p 702:

> I agree with the view of the learned Chief Judge that the words 'any other cause' in s 78 are clear enough to cover a situation where a judge has retired as in this case.

[52] We saw no reason not to agree with the views of the learned former members of this court. Their views are consistent with the well trusted concept or principle of construing words in a piece of legislation in a reasonable and purposive manner. Any other interpretation in our view would be contrary to the intention of Parliament which we have and can be discerned by the words used as well as the context in which they were used. In the circumstances, we rejected the contention of the Bar Council.

Unconstitutional appointment of Tan Sri Zulkefli

[53] In view of our opinion on the issue of coram failure, we saw no reason to deal with this issue.

Conclusion

[54] We were fully aware that this power of review prescribed in r 137 should be exercised only in exceptional circumstances set out earlier by us. This case fell within established circumstances in which this court will review its earlier decision. In this case, it was one of coram failure rendering the majority judgment illegal as it had breached a provision in law in the form of s 78 of the CJA.

[55] Though we appreciated the fact that the three majority judges had attempted to say that the judgment of Tan Sri Zulkefli was really their judgment, a non-existing judgment, with respect, cannot play any part or relied on in their deliberation in coming to their decision.

[56] For reasons above, we set aside the judgments, majority and minority, and ordered that this appeal be heard by another panel of this court. We made no order as to costs.

Order accordingly.

Reported by Ashok Kumar